

Letter of Findings: 02-20130606P
Corporate Income Tax - Underpayment Penalty
For the Tax Year 2011

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is suspended by the publication of another document in the Indiana Register.

ISSUE

I. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; IC § 6-8.1-9-2; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer files an Indiana Adjusted Gross Income Tax Return (IT-20). When Taxpayer filed its original 2011 income tax return on September 12, 2012 (with proper extensions), it reported tax due of just under \$20,000 and a credit of approximately \$90,000, thus stating an overpayment of just over \$70,000, which Taxpayer requested be applied as an estimated payment of 2012 taxes. Later, on June 15, 2013, prior to filing its 2012 income tax return, Taxpayer amended its 2011 income tax return to increase its tax liability to just above \$35,000, thus reducing the overpayment to approximately \$55,000. Again, Taxpayer requested that the reduced overpayment be applied to its 2012 taxes.

The Indiana Department of Revenue (the "Department") assessed Taxpayer a ten-percent negligence late payment penalty on the approximately \$15,000 deficiency from the original 2011 tax it reported and paid because that amount was a late payment of 2011 tax. Taxpayer protested the assessment of penalty. A hearing was held on Taxpayer's protest, and this Letter of Findings ensues. Further facts will be supplied as required.

I. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer protested the assessment of a negligence penalty on the difference between the 2011 tax it originally paid and the 2011 amended amount it eventually paid. Taxpayer's rationale for the request of waiver of the penalty is that "the Department was in possession of the money at all times."

As a preliminary matter, Taxpayer's request for waiver of penalty is based on a mistaken understanding of the tax treatment of an overpayment in one tax year which is carried over as an estimated payment to a subsequent year. The Department does not operate as if it is Taxpayer's bank. Once Taxpayer stated an overpayment in one year that it requested be credited to a subsequent year, that carryover of the overpayment became Taxpayer's estimated payment for that subsequent year. IC § 6-8.1-9-2(a). In other words, the tax years stand alone. The amount that Taxpayer originally requested be carried over from 2011 to 2012 became a separate estimated payment for 2012. The 2012 estimated payment did not reside in a "bank account" from which Taxpayer could then withdraw money to pay the amended amount it later reported for the prior year, 2011.

Therefore, when Taxpayer realized that it had underpaid its 2011 tax obligations to Indiana and filed an amended 2011 income tax return, the amount it had underpaid represented a stand-alone late payment for that year. The Department assessed a ten percent negligence penalty on that amount pursuant to IC § 6-8.1-10-2.1, which states in relevant part:

(a) Except as provided in [IC 6-3-4-12\(j\)](#) and [IC 6-3-4-13\(l\)](#), a person that:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;

is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10[percent]) of:

- (1) the full amount of the tax due if the person failed to file the return;
- (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
- (3) the amount of the tax held in trust that is not timely remitted;
- (4) the amount of deficiency as finally determined by the department; or
- (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier,

or personal delivery by the due date.

(d) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

(e) A person who wishes to avoid the penalty imposed under this section must make an affirmative showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust, in a written statement containing a declaration that the statement is made under penalty of perjury. The statement must be filed with the return or payment within the time prescribed for protesting departmental assessments. A taxpayer may also avoid the penalty imposed under this section by obtaining a ruling from the department before the end of a particular tax period on the amount of tax due for that tax period.

(Emphasis added).

Based on the above, a person who "incurs, upon examination by the department, a deficiency that is due to negligence," is subject to a penalty of ten percent of the deficiency. IC § 6-8.1-10-2.1(a)(3).

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect and must make an affirmative showing of all the facts alleged as a reasonable cause for the failure to pay the full tax due. IC § 6-8.1-10-2.1(d) and (e).

The Indiana Administrative Code, [45 IAC 15-11-2](#), further provides:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Therefore, Indiana law requires Taxpayer to demonstrate that it had reasonable cause for not remitting the full income tax due. In order to establish reasonable cause, Taxpayer must make an affirmative showing that it exercised "ordinary business care and prudence" in conducting the duties from which the additional tax and penalty arose. [45 IAC 15-11-2\(c\)](#).

Subsequent to the hearing, Taxpayer was asked to provide an explanation of why it originally underreported its income tax due. Taxpayer explained that the amended return was a result of finding an error on the original return relating to an amortization deduction that Taxpayer later realized it was not entitled to take. In the amended return, Taxpayer added back the book amortization to correct its error.

As required by [45 IAC 15-11-2\(c\)](#), after review of the documentation and analysis provided in the protest process, Taxpayer has affirmatively established that its failure to correctly file its original 2011 return was not due to willful neglect as evidenced by the amended return that corrected the error. While technically the late payment negligence penalty was properly imposed, the overall circumstances in this case suggest waiver of the penalty is appropriate.

Therefore, the Department will abate the ten-percent penalty at issue.

FINDING

Taxpayer's protest is sustained.

Posted: 04/30/2014 by Legislative Services Agency

